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NO. 93-1860

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

AUSTEX, LTD., MUNDAY ENTERPRISES,
DONNIE RUTH MOORE EDWARDS, TOM ALLEN,
CENTENNIAL MORTGAGE, ET AL.,
Petitioners

v.

STATE OF TEXAS AND CITY OF AUSTIN,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Does the United States Supreme Court have jurisdiction to review the judgments of the Supreme Court of the State of Texas pursuant to 28 U.S.C. §1257(a) (1988) where the Texas Supreme Court has neither passed on the federal constitutional issues urged before this Court nor were those issues properly raised in the State court?

Does the United States Supreme Court have jurisdiction to review the judgments of the Texas Supreme Court which were remanded to the trial court for a new trial?

Did the Texas Supreme Court, in following the rule of the United States Supreme Court announced in *Campbell v. United States*, 266 U.S. 368 (1924), violate the Just Compensation Clause of the Fifth Amendment or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

LIST OF PARTIES

Respondents adopt the statement of Petitioners with respect to the parties as they appeared before the Supreme Court of Texas.

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OPINIONS BELOW

The "Opinions of Lower Courts" section of the Petition For Writ of Certiorari accurately summarizes the lower court proceedings.

JURISDICTION

Under the circumstances presented here, 28 U.S.C. §1257(a) (1988) does not confer jurisdiction on this Court as alleged by Petitioners. This Court lacks jurisdiction to review the Texas Supreme Court judgments because (1) they were based entirely upon Texas statutory law and judicial precedent, (2) the Federal Constitutional issues were neither decided by nor raised in the Texas courts, and (3) the decisions are consistent with this Court's precedent on the pertinent Federal

Constitutional issues. Additionally, the decisions which were remanded for a new trial[1] are not ripe for review.

The Petitioners attempted to raise the Federal Constitutional issues they complain of now for the first time on motions for rehearing to the Texas Supreme Court, which were overruled without comment.[2] Under Texas law, a Constitutional challenge must be made at the trial court level unless the challenge constitutes fundamental error. *Pedraza v. Tibbs*, 826 S.W.2d 695, 698 (Tex. App.--Houston [1st Dist.] 1992, writ denied). In the absence of fundamental error, a Constitutional challenge may not be raised for the first time in the Texas Supreme Court, especially on a motion for rehearing. *Johnson v. Lynaugh*, 796 S.W.2d 705, 707 (Tex. 1990); *Watson v. Glen Falls Ins. Co.*, 505 S.W.2d 793, 797 (Tex. 1974); Tex. R. App. P. 131(e).

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[1] *State v. Allen*, 870 S.W.2d 1 (Tex. 1994); *State v. Centennial*, 867 S.W.2d 783 (Tex. 1993); and *State v. Munday Enterprises*, 868 S.W.2d 319 (Tex. 1993).

[2] Pet. at 8, 9; Pet. App. at A-4, A-69, A-70, A-111, A-112, A-124, A-125, A-153, A-154.

Petitioners do not assert fundamental error, nor could they on these facts. "Fundamental error survives today in those rare instances in which the record shows the court lacked jurisdiction or that the public interest is directly and adversely affected as that interest is declared in the statutes or the Constitution of Texas." *Pirtle v. Gregory*, 629 S.W.2d 919, 920 (Tex. 1982).

This Court addressed these very jurisdictional issues in *Yee v. Escondido*, __ U.S. __, 112 S.Ct. 1522 (1992). In *Yee*, petitioners attempted to raise a substantive due process claim for the first time in their Petition for Review which was denied by the California Supreme Court. Noting that petitioners did not raise a substantive due process claim in the state courts and that no state court had addressed such a claim, this Court held that it

> has, with very rare exceptions, refused to consider petitioners' claims that were not raised or addressed below. *Illinois v. Gates*, 462 U.S. 213, 218-220, 103 S.Ct. 2317, 2321-2323, 76 L.Ed.2d 527 (1983). While we have expressed inconsistent views as to whether this rule is

> jurisdictional or prudential in cases arising from state courts, see *ibid.*, we need not resolve the question here. (In cases arising from federal courts, the rule is prudential only. See, *e.g.*, *Carlson v. Green*, 446 U.S. 14, 17, n. 2, 100 S.Ct. 1468, 1470, n. 2, 64 L.Ed.2d 15 (1980).) Even if the rule were prudential, we would adhere to it in this case. Because Petitioners did not raise their substantive due process claim below, and because the state courts did not address it, we will not consider it here. *Id.* at 1531.

Comparatively, this Court should be even more reluctant to accept jurisdiction where separate, compelling and long-standing state law authorities, both statutory and judicial precedent, support the Texas Supreme Court decisions. An independent and adequate state law ground will defeat this Court's jurisdiction *even where a question of federal law is decided by a state court* (which is, of course, denied here by Respondents). *Coleman v. Thompson*, __ U.S. __, __, 111 S.Ct. 2546, 2553-54 (1991), *citing Fox Film Corp. v. Muller*, 296 U.S. 207, 210, (1935); *Klinger v. Missouri*, 13 Wall. 257, 263, 20 L.Ed 635 (1872).

The *Allen*, *Centennial* and *Munday* cases were remanded for new trials and, therefore, are not ripe for review. *O'Dell v. Espinosa*, 456 U.S. 430 (1982). The Petitioners cite *Cox Broadcasting*[3] to support their contention that the Court should exercise discretionary authority. However, such reliance is misplaced for two reasons; first, because of jurisdictional reasons previously discussed; and second, a compelling federal policy is absent on these facts since the holdings of the Texas Supreme Court are consistent with this Court's decision in *Campbell*. Indeed, although the Texas Supreme Court expressly disavowed analysis from a Fifth Amendment perspective in its *Austex* decision,[4] it nevertheless followed the *Campbell* rule.

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[3] 420 U.S. 469 (1975).

[4] *State v. Austex, Ltd.*, 867 S.W.2d 769 (Tex. 1993)

RESPONSE TO PETITIONERS' STATEMENT

Petitioners' tracts of land were situated on United States Highway 183 ("U.S. 183"). At that time, U.S. 183 consisted of six lanes of traffic, three each for northbound and southbound traffic separated by a grassy median. Approximately ten years prior to trial, the City Council of Austin, Texas petitioned the Texas Department of Transportation to alleviate traffic congestion on U.S. 183. Petitioners' lands were acquired to meet federal guidelines for highway construction and, in certain of the causes below, to provide additional area for road construction incident to the highway project which will improve U.S. 183. When completed, the project will enable traffic to reach adjacent properties, including Petitioners' properties, through a system of frontage or access roads consisting of three southbound and three northbound lanes. The access roads are virtually identical to the original U.S. 183 except that they will be curbed and guttered.

Six main highway lanes, three each for northbound and southbound traffic, will be elevated above ground level. A system of entry and exit ramps will connect the access roads to the main lanes.

At trial, the Petitioners in *Allen*, *Centennial*, and *Munday* suffered damages to their property not taken (the "remainder") which was peculiar to their respective remainders and not attributable to the project generally or the proposed use of the land taken from others. However, all of the Petitioners sought damages they alleged were due to (1) diversion of traffic, (2) increased circuity of travel to the property, (3) lessened visibility to passersby, and (4) inconvenience of construction activities. Respondents objected to the admission of such evidence because it pertained to damages not recognized under Texas law. Contrary to the Petitioners' characterization of the Texas Supreme Court's holding in *Austex*,[5] the Texas Supreme Court

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[5] Pet. at 8.

unanimously held, citing authorities spanning more than 100 years of Texas jurisprudence, that (1) the damages claimed by Petitioners did not amount to a taking or damaging of property that is compensable in an inverse condemnation case; (2) the general rule in inverse condemnation cases and condemnation cases has been the same with respect to the elements of injury; (3) the court had never allowed recovery for severance damages like those claimed by Petitioners; (4) the damages claimed by Petitioners did not result from the taking of their property, but from the State's new use of its existing right-of-way and of property taken from other landowners to widen it; and, (5) the damages claimed by Petitioners were community in nature and, therefore, not compensable under the Texas condemnation statute.

REASONS FOR DENYING WRIT OF CERTIORARI

I. THE TEXAS SUPREME COURT DECISIONS WERE BASED ENTIRELY ON STATE LAW.

In *Austex*[6] a unanimous Texas Supreme Court adopted the federal rule announced by this Court in *Campbell v. United States*, 266 U.S. 368 (1924). This being so, it can hardly be seriously argued that this Court's criteria for granting certiorari have been met. Sup. Ct. R. 10, 28 U.S.C. (1994). Not only do Petitioners misconstrue *Campbell* in urging this Court's grant of certiorari, but they ignore the fact that the Texas Supreme Court's decision rested not on *Campbell* but on the Texas Property Code,[7] its prior decision in *State v. Clark*,[8] and a myriad of Texas Supreme Court and appellate decisions construing §21.042(c) and (d) of the Texas

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[6] *Austex, Ltd.*, 867 S.W.2d at 778, 779.

[7] Tex. Prop. Code Ann. §21.042 (Vernon 1984).

[8] 336 S.W.2d 612 (Tex. 1960).

Property Code in the context of community injury and benefit. *Austex, Ltd.*, 867 S.W.2d at 777, 781.

Section 21.042 of the Texas Property Code is the foundation upon which the entire body of Texas law rests in condemnation cases. It was the application of subsections (c) and (d) of §21.042 which compelled the decisions of the Texas Supreme Court below. As noted by the Texas Supreme Court:

> The State contends that Schmidt and Austex are not entitled to severance damages because the damages they claim did not result from the taking of their property, but from the State's new use of its existing right-of-way and of property taken from other owners to widen it. We agree.
>
> Section 21.042(c) requires consideration of "the effect of the condemnation on the value of the property owner's remaining property." *The effect of the State's condemnation on each tract in the present cases--that is, the taking of a small strip of property--is different from the effect of the State's change in Highway 183. The statute allows recovery only for the former.* *Austex, Ltd.* 867 S.W.2d at 777, 778. (Emphasis added).

Similarly, in *Austex* the Texas Supreme Court held that the damages complained of by Petitioners were not an "effect of the condemnation on the value of the property owner's remaining property" within the cognizance of §21.042(c) because they are not allowed by §21.042(d). *Id.* at 781. As stated by the court:

> The diversion of traffic, inconvenience of access, impaired visibility of ground-level buildings, and disruption of construction activities of which Schmidt and Austex complain are, by their nature, a consequence of the change in Highway 183 shared by the entire area through which it runs. While one or more of these elements of injury could affect the Schmidt and Austex tracts in some special, unique way, different from the effect on the surrounding area, there is no claim here that they do. Schmidt and Austex may be impacted more severely than some others in the area, but the difference is one of degree and not of kind. Thus, we agree with the State that the severance damages claimed are not allowed by §21.042(c). *Id.*

Thus, it was Texas law which was and is determinative of the issues presented here.

II. THE TEXAS SUPREME COURT DECISIONS ARE IN ACCORD WITH DECISIONS OF THIS COURT INTERPRETING THE JUST COMPENSATION CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION IN PARTIAL TAKING CASES WHERE THE DAMAGES TO THE REMAINING LAND RESULT FROM THE USE TO BE MADE OF THE LANDS ACQUIRED FROM OTHERS.

Petitioners claim damages to their remaining land as a result of the use to be made of the lands acquired from others. *Campbell* is the law of the land regarding the applicability of the Fifth Amendment to the facts of these partial taking cases where the compensability of consequential damages related to the public project giving rise to the taking is concerned. *Campbell*, 266 U.S. at 369-71. In *Campbell*, this Court acknowledged that the petitioner, John V. Campbell, on the taking of a part of his land, "[b]ecame entitled to have the just compensation safeguarded by the Fifth Amendment to the Constitution; that is, the value of the land taken and the damages inflicted by the taking - such a sum as would put him in as good a position pecuniarily as he would have been

if his property had not been taken. (Citation omitted.) But he was not entitled to have more than that." *Campbell*, 266 U.S. at 371. The Court reasoned that he *was not* entitled to compensation for damages to his remaining land *by reason of the uses to be made of lands acquired from others for the same project*. As stated by this Court:

> [p]laintiff had no right to prevent the taking and use of the lands of others; and the exertion by the United States of the power of eminent domain did not deprive him of any right in respect of such lands. And, if the land taken from Plaintiff had belonged to another, or if it had not been deemed part and parcel of his estate, he would not have been entitled to anything on account of the diminution in value of his estate. *It is only because of the taking of a part of his land that he became entitled to any damages resulting to the rest. In the absence of a taking, the provision of the Fifth Amendment giving just compensation does not apply*; and there is no statute applicable in this case that enlarges the constitutional right. *Id.* (Emphasis added.)

Campbell establishes the rule that the threshold of the Fifth Amendment is not crossed where compensation is claimed for diminution in value attributable not to the taking but to the

proposed use of the lands taken from others. *Campbell*, 266 U.S. at 371. The point on which *Campbell* turns is whether the proposed use of the lands taken from others *constitutes a taking of the property owner's property. Id. citing Richards v. Washington Terminal Co.*, 233 U.S. 546, 554 (1914) (Emphasis added). In *Richards*, this Court stated:

> [a]ny diminution of the value of property *not directly invaded nor peculiarly affected*, but *sharing in the common burden of incidental damages* arising from the legalized nuisance, is held not to be a "taking" within the constitutional provision. The immunity is limited to such damages as naturally and unavoidably result from the proper conduct of the road and are shared generally by property owners whose lands lie within range of the inconveniences necessarily incident to proximity to a railroad. *Richards*, 233 U.S. at 554. (Emphasis added).

The holding in *Campbell* is plain and well-reasoned:

> The rule supported by better reason and the weight of authority is that the just compensation assured by the Fifth Amendment to an owner, a part of whose land is taken for public use, does not include the diminution in value of the remainder caused by the acquisition and use of adjoining lands of others

> for the same undertaking. *Campbell*, 266 U.S. at 372.

Hence, the damages awarded to a condemnee precipitated by a taking are distinguished from the damages which may accrue on account of the public works or project for which the lands are taken. The Fifth Amendment applies only to the former. Contrary to Petitioners' characterization, the Texas statute as applied by its Supreme Court is in harmony with this Court's precedents. The proposed use by the State of Texas of its own highway right-of-way and of lands taken from others to widen the highway does not constitute a taking of Petitioners' property for which compensation is due under the Fifth Amendment.[9]

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[9] Petitioners' reliance on *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) and *Lucas v. So. Carolina Coastal Council*, __ U.S. __, 112 S.Ct. 2886 (1992) demonstrates that they have missed the Constitutional point. Petitioners confuse the compensability of negative effects of the taking on the property owner's remaining property (for which compensation is required under the Fifth Amendment) with effects on the property owner's remaining property caused by the taking of property of others for the same project (for which compensation is not required by the Fifth Amendment). Applying the rules of *Loretto* and *Lucas*, it is apparent that the diminution in value of Petitioners' remainder does not trigger a taking under the Fifth Amendment because it suffers neither a physical invasion nor a denial of all beneficial or productive use of the land.

III. THE TEXAS SUPREME COURT DECISIONS ARE IN ACCORD WITH THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

As an initial matter, Petitioners misstate the appropriate standard of review.[10] Petitioners argue for a heightened standard of review reserved for protected classes citing this Court's decision in *City of Cleburne, Tex. v. Cleburne Living Center*.[11] The heightened scrutiny standard is not applicable to this case. It is nowhere asserted, and could not be argued, that either party is within a protected class demanding heightened scrutiny. The appropriate rule is "that legislation is *presumed* to be valid and will be sustained if the classification drawn by the statute is *rationally related* to a legitimate state interest. *Heller v. Doe by Doe*, __ U.S. __, __, 113 S.Ct. 2637, 2642 (1993). (Emphasis added).

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[10] Pet. at p. 14.

[11] 473 U.S. 432 (1985)

The Texas statutes which prescribe the evidentiary confines and the measure of damages in condemnation cases,[12] and which form the bases of the holdings of the Texas Supreme Court below, precisely mirror the rules announced by this Court. Indeed, the holding of *Campbell* is exactly the holding of the Texas Supreme Court in *Austex* regarding §21.042(c); that is, "the effect of the condemnation on the value of the property owner's remaining property" includes those damages attributable to the acquisition, not those damages attributable to the use of adjoining lands of others for the same undertaking. *Campbell*, 266 U.S. at 371, 372. Similarly, §21.042(d) of the Texas Property Code regarding community damages precisely mirrors the rule of this Court in *Richards*. *Richards*, 233 U.S. at 554.

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[12] Tex. Prop. Code Ann. §21.042(b) and (c) (Vernon 1984) discussed *infra*. at pp. 13-18.

CONCLUSION

The decisions of the Texas Supreme Court were based on Texas law. No federal issues were decided by or presented to the Texas Supreme Court. The state issues presented to the Texas Supreme Court were decided in harmony with this Court's holdings in *Campbell* and *Heller* with respect to Petitioners' Fifth and Fourteenth Amendment issues, respectively. Accordingly, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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